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Nos. 84-1332 and 84-1352

In the Supreme Court of the United States

OCTOBER TERM, 1984

K. JANELLE BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

TONY D. BLAUVELT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Both petitions present the following question:

1. Whether the government improperly used petitioner Tony Blauvelt's grand jury testimony to impeach his testimony at trial.

The petition in No. 84-1332 presents the following additional question:

2. Whether the evidence is sufficient to support petitioner's conviction for wilfully failing to file a federal income tax return, in violation of 26 U.S.C. 7203.

The petition in No. 84-1352 presents the following additional question:

3. Whether the grand jury was properly instructed regarding the element of wilfulness for the offense of wilfully failing to file an income tax return, 26 U.S.C. 7203.

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OPINION BELOW

The opinion of the court of appeals (84-1332 Pet. App. 1a-6a)[1] is unreported.

JURISDICTION

The judgment of the court of appeals in both cases, which were consolidated in that court, was entered on November 30, 1984. A petition for rehearing in both cases was denied

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[1]Hereafter, "Pet. App." will refer to the appendix to the petition in No. 84-1332 unless otherwise noted.

on January 24, 1985 (Pet. App. 7a; 84-1352 Pet. App. 7a). The petition for a writ of certiorari in No. 84-1332 was filed on February 20, 1985. The petition for a writ of certiorari in No. 84-1352 was filed on February 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners Janelle Blauvelt and Tony Blauvelt were convicted on three counts of wilfully failing to file income tax returns for the years 1978, 1979, and 1980, in violation of 26 U.S.C. 7203. Petitioner Janelle Blauvelt was sentenced to 30-days' confinement at a half-way house, was fined $1,500, and was placed on probation for a period of four years to begin upon her release from confinement. Petitioner Tony Blauvelt was sentenced to a one-year term of imprisonment was fined $2,500, and was placed on probation for a period of five years to begin upon his release from confinement. The court of appeals affirmed (Pet. App. 1a-6a).

1. a. Petitioners are husband and wife, and they lived together for the years 1978-1980 (Pet. App. 2a; Tr. 63-64, 313-314). During that period, both were gainfully employed, and each realized sufficient income to require the filing of federal income tax returns (GX 24, 26, 28, 30-38, 40, 42, 44, 55; Tr. 65-68, 81, 89-91, 194-201, 232-233, 294).[2] However,

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[2]Petitioners' combined gross income for the years in question was as follows (Pet. App. 2a; GX 55; Tr. 194-200):

1978:	$70,664.96
1979:	$101,722.72
1980:	$119,654.79

Given the community property laws of Texas, where petitioners lived during this period (Tr. 320), each petitioner was required by federal law to report as taxable income one-half of this combined gross income (Pet. App. 2a-3a).

neither petitioner filed a separate or a joint federal income tax return for those three years (GX 1-3; Tr. 108, 112-113; 301).

The evidence adduced at trial showed that petitioners' failure to file these returns was wilful. Internal Revenue Service records proved that petitioners had filed joint returns (Form 1040) in 1974, 1975, and 1976 (GX 20-22; Tr. 103-107, 116, 233).[3] Petitioner Tony Blauvelt is a sales representative, holds a bachelor's degree in chemical engineering, and has pursued postgraduate studies in law, taxation, and other areas (Pet. App. 2a; Tr. 257, 307-308). He had taken a college-level course on the preparation of federal income tax returns and knew from that course that the federal income tax laws required him to file a return for the years in question (Pet. App. 2a; Tr. 167, 174, 242-243, 257, 301-302, 314).[4] Petitioner Janelle Blauvelt had attended college (but did not receive a degree) and was employed as a secretary for a construction company, but had experience in bookkeeping, which she performed for her employer (Pet. App. 2a; Tr. 125-126, 130-132, 315). In that capacity, among other things, she was responsible for calculating and deducting F.I.C.A. and federal withholding tax from employees' paychecks (Pet. App. 2a; Tr. 125-126, 130-132).

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[3]Petitioners' returns for those years reflected the following amounts of adjusted gross income (Tr. 103-107):

1974: $14,583

1975: $12,562

1976: $20,557

However, petitioner Tony Blauvelt filed his 1975 and 1976 returns only after being ordered by the United States District Court for the Northern District of Texas to comply with an IRS administrative summons requesting him to produce various documents relating to those tax years (GX 46-48; Tr. 138-157, 238).

[4]Petitioner Tony Blauvelt also holds a real estate broker's license and an employment agency license (Tr. 310-313).

b. Prior to trial, petitioner Tony Blauvelt voluntarily testified before the grand jury. In that testimony, he claimed that he was entitled to be absolved from all liability for failing to file income tax returns for the years in question on the ground that the IRS has historically declined to prosecute executors and trustees for their failure to submit required tax returns (5/3/83 Tr. (Tony Blauvelt) 12-35; see also Tr. 381-386). Tony Blauvelt also testified at trial. This time, however, he claimed that he had failed to file the returns because of his fear that, had he done so, he might incriminate himself (Tr. 279-282, 303-304, 306, 327-328, 335). In this regard, he stated that his fear was based upon a warning that he had received from an IRS official at the time that he filed his 1976 return (Tr. 248-249, 318, 327-328; see Pet. App. 3a; see also page 3 note 3, *supra*), and he also maintained that the tax return forms were too complex for him to complete without doing so erroneously and unlawfully (Pet. App. 3a; Tr. 236, 238, 307-312).

On cross-examination, the prosecutor, in order to impeach petitioner's testimony, brought out the fact that petitioner did not rely upon that excuse for his failure to file a return when he voluntarily testified before the grand jury (Tr. 304, 351-352, 354-357, 381-386). The government pursued this line of inquiry to show that petitioner's trial testimony was a recent fabrication (Tr. 428).

2. The court of appeals affirmed the convictions of both petitioners in an unpublished opinion (Pet. App. 1a-6a). The court found (*id.* at 3a-4a) that, given petitioners' education, business experience, and history of filing prior federal income tax returns, there was sufficient evidence to allow the jury to find that petitioners had wilfully failed to file a federal income tax return for the years in question. Moreover, the court held (*id.* at 5a) that any misuse by the government of petitioner Tony Blauvelt's grand jury testimony to impeach his testimony at trial was harmless

beyond a reasonable doubt, assuming that any error occurred at all. The court also rejected without discussion (*id.* at 6a) petitioners' claim that the government had misled the grand jury regarding the proper meaning of the term "wilful" for purposes of 26 U.S.C. 7203.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Both petitioners contend (84-1332 Pet. 3-22, 29-30; 84-1352 Pet. 14-26) that the government violated their Confrontation and Due Process Clause rights by using petitioner Tony Blauvelt's grand jury testimony to impeach his testimony at trial. That claim lacks merit.[5]

Contrary to petitioner's repeated assertions, the government did not improperly introduce prejudicial evidence before the jury. Rather, the government merely elicited from petitioner the fact that he had voluntarily testified before the grand jury and had been afforded a full opportunity to explain his failure to file the required tax returns, but had omitted from his grand jury testimony the excuse

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[5]Petitioner Janelle Blauvelt erroneously asserts (84-1332 Pet. 3-22) that her rights were violated by the government's use of her husband's grand jury testimony to impeach his trial testimony. Both at the time of the impeachment (Tr. 372-373) and at the close of the evidence (Tr. 484-485; see also Tr. 482), the district court instructed the jury that it could consider this evidence only in connection with her husband and not as proof of her guilt. Moreover, because her husband's grand jury testimony was not hearsay (see Fed. R. Evid. 801(d)(1)(A) (prior, sworn inconsistent statement)), and because he was available for cross-examination regarding his statements, admission of that testimony did not violate her rights under the Confrontation Clause. See *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 5; *California* v. *Green*, 399 U.S. 149 (1970).

for his nonfeasance that he offered at trial (see page 4, *supra*). This line of questioning was an entirely proper effort to show that petitioner's trial testimony was a recent fabrication. See *Anderson* v. *Charles*, 447 U.S. 404 (1980). Nor was that evidence hearsay. Petitioner's own statements (Tr. 386) were admissible either as admissions (Fed. R. Evid. 801(d)(2)(A)) or as prior, sworn inconsistent statements (Fed. R. Evid. 801(d)(1)(A)). The statements of the prosecutor and the grand jurors (Tr. 377, 386) were not hearsay because they were offered simply to show that petitioner had been advised of his rights, not to prove the truth of the matters asserted therein. See Fed. R. Evid. 801(c); *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 4; *Anderson* v. *United States*, 417 U.S. 211, 219-220 (1974).[6]

2. Petitioner Janelle Blauvelt contends (84-1332 Pet. 22-29) that the evidence is insufficient to support her convictions for wilfully failing to file a federal income tax return. She does not deny that she failed to file a tax return for the years in question; rather, her claim is that the evidence does not support the jury's finding that her failure to do so was wilful. However, both the district court (Tr. 226, 405-406) and the court of appeals (Pet. App. 4a) found that the evidence was sufficient to support petitioner's convictions. Given these concurrent factual findings by both lower courts, review by this Court of petitioner's fact-bound claim is unwarranted. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[7]

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[6]For that reason, petitioner Tony Blauvelt's Confrontation Clause claim must also fail. See *Tennessee* v. *Street*, slip op. 5; *Dutton* v. *Evans*, 400 U.S. 74, 88 (1970) (plurality opinion).

[7]In any event, as the court of appeals explained (Pet. App. 4a), the government adduced sufficient circumstantial evidence to support the finding that she wilfully failed to file the returns in question (pages 2-3,

3. Petitioner Tony Blauvelt maintains (84-1352 Pet. 6-14) that the prosecutor misled the grand jury regarding the correct meaning of the term "wilful" for purposes of 26 U.S.C. 7203. That claim also lacks merit.

Petitioner relies upon one statement made by the prosecutor to the grand jury during the testimony of an IRS agent in which the prosecutor commented upon the elements of 26 U.S.C. 7203[8] as the basis for his claim (84-1352 Pet. 8) that the government "destroyed [his] presumption of innocence" and misled the grand jurors "into believing that a non-filer, with substantial earnings, was more guilty than a party who did not owe any tax." However, petitioner has mischaracterized the prosecutor's statement. That statement does not suggest that petitioner should be indicted simply because he owed a substantial amount of tax. At most, the remark simply suggests that the existence of a substantial tax liability is probative evidence of wilfulness, and that is a correct statement of the law. See, *e.g., United States* v. *Garguilo,* 554 F.2d 59, 62 (2d Cir. 1977); *United States* v. *Walker,* 479 F.2d 407, 409 (9th Cir. 1973); *Lumetta* v. *United States,*

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supra). See *United States* v. *Garguilo,* 554 F.2d 59, 62 (2d Cir. 1977). Petitioner's defense was that she lacked access to information regarding her husband's income (Pet. App. 4a; 84-1332 Pet. 24-29). However, the only evidence supporting that defense was the trial testimony of her husband (Pet. App. 4a; Tr. 287), whom the jury was entitled to disbelieve. See *United States* v. *Bailey,* 444 U.S. 394, 414-415; *Hoffa* v. *United States,* 385 U.S. 293, 311 (1966). Petitioner also made no effort during that period to obtain the necessary information from her husband or to seek advice as to whether and how to file a partial return. Pet. App. 4a; Tr. 282-283.

[8]The statement is as follows (5/3/83 Tr. (Beatrice Casterline) 10-11):

> Keep in mind, that's not something the government has to prove. We don't have to prove that he owed any tax. Generally they're not referred for prosecution unless there's a substantial amount owed. It also shows willfulness. If a person didn't owe any tax, he might in good faith argue that he didn't owe any tax and didn't have to file a tax return.

362 F.2d 644, 645-646 (8th Cir. 1966). Furthermore, the prosecutor instructed the grand jury at other points during the proceedings that, to prove an offense under 26 U.S.C. 7203, the government was required to show that petitioners were required to file a tax return, that they failed to do so, and that their failure was wilful (5/3/83 Tr. (Beatrice Casterline) 2-3; 5/3/83 Tr. (Tony Blauvelt) 6, 11). Accordingly, because the grand jury was correctly informed as to the elements of the offense of wilfully failing to file a federal income tax return, the district court properly denied petitioner's motion to dismiss the indictment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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